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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91218720
Party	Defendant NutraMarks, Inc.
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Attachments	Response to Order to Show Cause.pdf(19059 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Affordable Naturals, LLC, Opposer, v. NutraMarks, Inc., Applicant.	Opposition No.: 91218720 Mark: SIMPLERS Serial No.: 86078760

RESPONSE TO ORDER TO SHOW CAUSE

Applicant NutraMarks, Inc. ("Applicant"), by and through its counsel hereby submits this response to the Board's December 3, 2014 Order to Show Cause and requests that the entry of default be vacated.

Opposer instituted this Opposition action ("the Notice") alleging a likelihood of confusion between its registered mark SIMPLY and Applicant's applied-for mark SIMPLERS. Applicant's Answer to Opposer's Notice was due November 16, 2014, and on December 3, 2014 the Board provided Applicant with 30 days to show cause why default judgment should not be entered.

Since the time of receiving Opposer's Notice, Applicant has been investigating both its prior use of the SIMPLERS mark and the various factual issues underlying the likelihood of confusion analysis that forms the basis for Opposer's Notice. In particular, Applicant is the successor-in-interest to Simplers Botanical Company, LLC, the original owner and user of the SIMPLERS mark who had been using the SIMPLERS trademark in commerce since 1983. After

investigating the history of use, Applicant has confirmed that it possesses senior common law rights to the SIMPLERS trademark, predating Opposer's alleged rights by approximately twenty-six (26) years.

Given that Applicant is the senior user of the alleged confusingly similar mark, Applicant also needed additional time to assess its rights and options, since under Opposer's allegations, Opposer is infringing Applicant's mark. If Applicant decides that litigation is appropriate to enforce its rights and consequently initiates such litigation, then Applicant would file an appropriate motion to stay this action pending the outcome of the litigation over these competing trademarks.

Applicant regrets not having filed for an extension of time prior to the due date of its Answer, which was caused by a miscommunication between counsel and Applicant. Counsel's neglect in requesting an extension of time was inadvertent. Applicant possesses numerous meritorious defenses to the Notice as described herein, and requests that default be vacated so that the claims may be decided on the merits, either in this forum or in federal court. Filed concurrently with this Response is Applicant's Answer that responds to the allegations in the Notice and further sets forth Applicant's defense of senior common law rights.

The standard for determining whether default judgment should be entered against the defendant for its failure to file a timely answer to a pleading is "good cause," as set forth in FRCP 55(c). "Good cause why default judgment should not be entered against a defendant, for failure to file a timely answer to the complaint, is usually found when the defendant shows that (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the

defendant has a meritorious defense to the action." TBMP 312.02. The standard for setting aside a default is fairly low, as "the Board is very reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve any doubt on the matter in favor of the defendant." *Id.* This policy is rooted in the principle that the law favors deciding cases on their merits. *Regent Baby Products Corp. v. Dundee Mills, Inc.*, 199 USPQ 571, 574 (TTAB 1978).

Here, as explained above, the failure to file a timely answer was not due to the willful conduct or gross neglect of Applicant. As stated above, Applicant has been in the process of investigating Opposer's allegations and Applicant's historical use of the mark at issue, and Applicant's failure to file a timely response or request an extension was based on an inadvertent oversight. Failure to file an answer in a timely manner based an inadvertent error is not sufficient grounds to find that such conduct was willful or grossly neglectful. *Fred Hayman Beverly Hills*, 21 USPQ2d at 1557.

Because the delay between the original Answer date and the submission of Applicant's Answer (submitted currently herewith) is less than 30 days, there should be no prejudice to Opposer for setting aside of the Notice of Default.

Finally, Applicant possesses a meritorious defense to Opposer's Notice, as explained above and as shown in Applicant's Answer submitted concurrently herewith. The showing of a meritorious defense does not require an evaluation of the merits of the case, but instead merely requires a plausible response to the allegations in the complaint. TBMP 312.02; *DeLorme Publishing* Co *v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000). Indeed, the Board has held that the filing of a non-frivolous Answer to a pleading adequately demonstrates that an applicant has a meritorious defense. *Fred Hayman Beverly Hills*, 21 USPQ2d at 1557. Thus,

because Applicant has met the requirement of showing a plausible meritorious defense, the notice of default should be set aside.

Wherefore, Applicant respectfully requests that the Board vacate the default entry and accept Applicant's Answer as filed.

Dated: December 9, 2014

Respectfully submitted,

/s/ Timothy P. Getzoff

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CERTIFICATE OF SERVICE

The undersigned certifies that the attached **RESPONSE TO ORDER TO SHOW CAUSE** was served on the below-identified counsel for Opposer on December 9, 2014 by the means indicated below:

☒ U.S. Certified Mail, postage prepaid
☐ Hand Delivery

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/s/ Timothy P. Getzoff

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